No. 89-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMBINED INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

THOMAS AINSWORTH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because petitioner has failed to meet its burden of affirmatively showing that the Nevada Supreme Court ruled on its constitutional claim.

2. Whether, assuming *arguendo* that jurisdiction exists, it should be exercised in a case presenting a novel constitutional challenge when the record is silent on the issue and there have been significant changes in state law that are not before the Court.

3. Whether the due process clause of the Fourteenth Amendment prohibits state courts from assessing punitive damages when juries are properly instructed under established common law standards and their verdicts are carefully reviewed on appeal.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner Combined Insurance Company of America seeks review of a punitive damages judgment that resulted from its oppressive conduct and bad faith refusal to pay an insurance claim. The relevant facts are largely set forth in the opinion of the Nevada Supreme Court. Petitioner's Appendix 60a (hereinafter "Pet. App."). In 1969 Respondent Ainsworth and his wife purchased insurance policies from Combined, which provided coverage for " 'any conceivable accident.' " *Id.* at 61a, 66a. After having paid pre-

miums for thirteen years, in January, 1982, Mr. Ainsworth suffered a catastrophic accident—a stroke—during the course of an angiogram, causing him to lapse into a coma and leaving him permanently disabled. On the advice of Mr. Ainsworth's physician, who believed that the stroke was caused by an accident, Mrs. Ainsworth submitted a claim for the $9,600 in benefits available under the policies.

Without conducting an independent investigation of any kind, without contacting Mr. Ainsworth's physicians, and without reviewing any medical records or x-rays other than the physician's report which accompanied the claim, petitioner summarily denied the claim alleging that Mr. Ainsworth's stroke was the result of a disease, and not an accident.[1] On the advice of a physician and Combined's salesman, Mrs. Ainsworth resubmitted the claim, with additional medical evidence demonstrating that the stroke was entirely accidental. *Id.* at 62a. Petitioner sent the claim to its retained physician, Dr. Goldfinger, but failed to provide him with the additional material provided by the Ainsworths, and failed to provide him with medical records from the hospital where the accident had occurred. Petitioner again denied the claim.

Mrs. Ainsworth resubmitted the claim a third time, with additional medical evidence. Petitioner again submitted the claim to its retained physician, this time with the additional medical information, but wrote (without sending) a letter of denial before it even

[1] The physician's original report accompanying the Ainsworths' claim indicated that the stroke was caused by an "[i]atrogenic accidental cerebral vascular accident during angiogram." Ignoring this language, Combined claimed to have relied on other language in the first report stating, "stroke occurred from disruption of arthcromatous plaque during angiogram."

received its physician's report. When it did receive the report, petitioner sent a third letter of denial, even though the report did not indicate that the stroke was the result of disease, but only that it occurred during a medical test to determine if there were a disease.[2] Mrs. Ainsworth resubmitted the claim a fourth time, accompanied by a letter from her husband's doctor, who confirmed that the angiogram " 'revealed no pre-existing vascular disease.' " *Id.* at 63a. This time the petitioner responded with an offer to settle the claim for 20% of what was due under the policies, provided its insured would execute a release of all claims. Mrs. Ainsworth rejected the offer and, for the fifth time, asked for full payment. Petitioner responded with a repetition of its 20% offer.

These repeated resubmissions of the claim were made at a time when the Ainsworths were financially desperate and in great need of the benefits to which they were entitled. Mr. Ainsworth's stroke prevented him from working. Having been denied the insurance benefits from petitioner, his financial ability to obtain critical treatment needed to reverse his severe speech disability was compromised. As a result, he now suffers permanent and irreversible speech and communication impairment. *Id.* at 68a.

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[2] The letter that Combined sent to the Ainsworths stated that the stroke was "directly contributed to by arteriosclerotic disease." Its doctor's subsequent report, however, stated only that the stroke "was not purely accidental since the [angiogram] was done to investigate the possible cause of [Mr. Ainsworth's transient ischemic attack]." This, in fact, represented a legal, not a medical conclusion. It was an interpretation of the insurance contract, asserting that accidents occurring during medical procedures were not covered.

Petitioner was fully aware of its insured's financial difficulties. *Id.* at 64a-65a. It received this information both from the Ainsworths, as well as from its own salesman in Nevada, who learned of it while attempting to collect an additional insurance premium from Mrs. Ainsworth. Despite this knowledge, petitioner continued to deny, for many months, the needed benefits. Finally, seeking to take advantage of its insured's economic distress, petitioner offered to settle for 20% of the amount due Mr. Ainsworth.

On July 8, 1983, Mr. Ainsworth filed the instant action in state district court, claiming that Combined had failed to deal with him in good faith, a tort in Nevada, and that it had breached its contract of insurance. Alleging petitioner's aggravated conduct, Ainsworth also sought punitive damages, as authorized by Nevada law.[3] Despite petitioner's objection that there was insufficient evidence, the trial court submitted the punitive damages issue to the jury. Pet. App. 188a, Instr. No. 24. Petitioner failed to object to the content of these instructions; it failed to propose any substitute or additional instructions; and it failed to suggest that the jury was required to receive any instructions on standards to be applied in the event that the jury assessed punitive damages.

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[3] Nev. Rev. Stat. Ann. §42.010(2) (1989) provides for punitive damages in appropriate tort cases in which there is a showing of "oppression, fraud or malice" on the part of the defendant. The Nevada Supreme Court previously had indicated that such damages could apply to insurance bad faith cases under appropriate circumstances. *Farmers Home Mut. Ins. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986); *United States Fidelity & Guaranty Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975).

The jury returned a verdict awarding Mr. Ainsworth damages of $9,600 under the insurance contract, $200,000 as compensatory damages for the bad faith refusal of the petitioner to pay the benefits due, and $5,939,500 in punitive damages.[4] In response, petitioner moved for a new trial and sought a judgment n.o.v. with respect to the punitive damage award, arguing that there was insufficient evidence to sustain the award. These were the only post-trial grounds of relief petitioner offered. Petitioner failed to request a reduction through remittitur of the amount of damages assessed by the jury, and also failed to question the constitutionality of the award of punitive damages.

In a reversal of her previous ruling, the trial judge granted judgment n.o.v. on the punitive damages award, finding there was insufficient evidence to establish "malice in fact." Pet. App. 73a. Mr. Ainsworth appealed. As the case came before the Nevada Supreme Court, it posed only one issue: was the evidence sufficient to support the jury assessment of punitive damages? Nevertheless, in response to Mr. Ainsworth's brief on appeal, petitioner attempted to raise, for the first time, a constitutional issue. It now asserted that reinstatement of the award of punitive damages would violate its constitutional rights under the excessive fines clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment.

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[4] As noted by the Nevada Supreme Court, this assessment amounted to "5% of Combined's 1985 net operating gain" and "constitute[d] only .04% of Combined's 1985 total assets." Pet. App. 68a.

The irrelevance of the constitutional issue to the appeal was recognized by the Nevada Supreme Court when it denied petitioner's request to delay the state court proceedings to await this Court's decision in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988):

> [T]he issue before this court appears to be the propriety of the district court's order granting a judgment not withstanding the verdict under the circumstances of this case, rather than the constitutionality of punitive damages generally.

Pet. App. 131a. Nor did petitioner demonstrate any seriousness about its belated constitutional claims. In a sixty-page brief, it devoted only the last two pages to the constitutional claims, and even that focused primarily on the Eighth Amendment issue. It wholly failed to raise the constitutional issues at oral argument before the Nevada Supreme Court.

The Nevada Supreme Court unanimously reversed the trial court, finding the evidence sufficient to sustain an award of punitive damages. The opinion was based solely on Nevada law regarding punitive damages and trial court discretion. The court's primary determination was based upon the sufficiency of the evidence of "oppression":

> Combined's obstinate and unjustified refusal to pay, in our opinion, constitutes oppression as contemplated by the statute. The evidence establishes that the Ainsworths were in desperate need of funds, and that Combined had reason to know of their dire circumstances. The record clearly supports an inference that

> Combined consciously disregarded the rights of its insured . . . .

Pet. App. 65a.

Reviewing the size of the punitive damages award, the supreme court applied the standards of its recent decision in *Ace Truck and Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).[5] The court analyzed the jury award in light of these standards, and concluded:

> Traditionally this Court has held that the amount of a punitive damages award was subjective, and therefore best left to the jury's determination. *Phillips v. Lynch*, 101 Nev. 311, 704 P.2d 1083 (1985); *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962). Recently we have attempted to define the allowable limits of punitive damages in a more objective fashion. *Ace Truck* [*and Equip. Rentals, Inc.*] *v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987). *Ace Truck* described several factors which contribute to an appellate evaluation of a punitive damages award. We conclude, however, that none of these factors prevent us from affirming the award in this case.

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[5] *Ace Truck* was decided after oral argument but before decision in the instant case. In it, the Nevada Supreme Court "attempted to define the allowable limits of punitive damages in a more objective fashion." Pet. App. 67a. In particular, the court set forth several criteria to be applied by trial and appellate courts in reviewing such awards. *See* p. 18-20 *infra*. The Court apparently applied these standards in the case at bar under its "inherent authority to issue a remittitur of the verdict." Pet. App. 14a n.9.

Pet. App. 67a.

In his Reply Brief, Ainsworth had argued that the constitutional issues were not properly before the court, because they had not been raised in the trial court, and were not properly preserved for review. Pet. App. 101a. The Nevada court did not discuss the constitutional issues in its decision other than possibly to include them in its concluding statement: "Other contentions have been considered and are deemed to be totally without merit." Pet. App. 69a.[6]

Petitioner filed a petition for rehearing, arguing that the punitive damages were excessive under state law, and raising unfounded and unsubstantiated allegations of improprieties by the then-Chief Justice of the Nevada Supreme Court.[7] The Nevada Supreme Court denied rehearing, finding no impropriety had occurred, and noted:

> Combined's counsel did not seriously attempt to present on appeal a factually persuasive or legally comprehensive argument that the verdict was so excessive as to warrant a remand or remittitur. To the contrary, counsel essentially proceeded on an "all or nothing" theory that included no particulars concerning the excessiveness of the punitive award.

Pet. App. 13a.

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[6] Petitioner also had presented several claims concerning the admissibility of certain evidence at trial and the appropriate burden of proof in a punitive damages case.

[7] Mr. Ainsworth also petitioned for rehearing on the basis of the refusal of the court to award interest on the punitive damages. This petition was denied.

In short, the only merits issue ever discussed by the Nevada Supreme Court was whether there was sufficient evidence to support submission of the punitive damages claim to the jury.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of a single issue—whether the judgment below violates the due process clause of the Fourteenth Amendment because the jury allegedly was given "unlimited discretion to award punitive damages without established standards on how those damages are to be measured." Petitioner's Brief at i (hereinafter "Pet. Br."). This issue was never raised in the trial court and never discussed by the Nevada Supreme Court. It should not be considered here for several reasons.

First, the Court lacks jurisdiction to hear the claim because petitioner has failed to satisfy its heavy burden of showing that the court below "passed upon" the federal law issue that it seeks to have reviewed. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Second, even if there were jurisdiction, the Court has repeatedly made clear that it will not decide a constitutional challenge to punitive damages in the absence of a "well-developed record and a reasoned opinion on the merits." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988). Third, both the Nevada Supreme Court and the state legislature recently have responded to the Court's invitation in *Bankers Life*, 108 S. Ct. at 1651, to address issues concerning the administration of punitive damages, and have made significant changes in the governing law. Consequently, this case essentially involves a challenge to a system for assessing punitive

damages that no longer exists. At the same time, further review threatens to unsettle important reforms before they have had a chance to become operational. Finally, even if the Court were inclined to review the issue raised by petitioner, this case is not an appropriate one in which to do so. Mr. Ainsworth is elderly and infirm, and has been engaged in oppressive litigation with petitioner for more than seven years. The Nevada Supreme Court has already noted petitioner's "misuse [of] the appellate processes of this court for the sole purpose of delaying a final resolution of this litigation." Pet. App. 43a.

I. Combined Has Failed Affirmatively To Demonstrate That The Nevada Supreme Court Decided Its Federal Claim.

It is well settled that this Court's jurisdiction to review a judgment by a state court must "*affirmatively* appear[] upon the record brought here for review on appeal." *Bailey v. Anderson*, 326 U.S. 203, 207 (1945) (emphasis supplied). *See* 28 U.S.C. § 1257.[8]

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[8] In furtherance of this requirement, Rule 21.1(h) of this Court's rules provides:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the

Thus, "when the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 150 (6th ed. 1986). As the Court has often stated,when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). *Accord, Exxon Corp. v. Eagerton, supra*, 462 U.S. at 181 n.3; *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Bailey v. Anderson, supra*, 326 U.S. at 206-07; *Chicago I. & L. Ry. v. McGuire*, 196 U.S. 128, 131-33 (1905).[9]

Petitioner does not even acknowledge this basic requirement, let alone attempt to meet the heavy bur-

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federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

[9] This settled rule is not affected by the "plain statement" requirement of *Michigan v. Long*, 463 U.S. 1032 (1983), whereby state courts were advised to make clear when they are resting a judgment on independent state law grounds. That doctrine, by its terms, applies only "when . . . a state court decision fairly appears *to rest primarily on federal law, or to be interwoven with the federal law.*" 463 U.S. at 1040 (emphasis supplied). This rationale has no applicability, however, when, as here, a state court declines to discuss an issue at all; in this latter circumstance, there is no risk that the court will make unreviewable federal law.

den that it imposes. Indeed, petitioner cannot meet this burden when the Nevada Supreme Court chose not to discuss the due process claim, because petitioner's own failure to raise the issue at trial constituted a state law, procedural barrier to appellate review.

During the trial, petitioner made no objection—constitutional or otherwise—to the content of the instructions on punitive damages. Under Rule 51, Nev.R.Civ.P., petitioner was thereby barred from raising, on appeal, any challenge to that jury instruction. Rule 51 expressly provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating directly the matter to which he objects and the ground of his objection." The Nevada Supreme Court strictly follows this rule. *See, e.g., Carson Ready Mix, Inc. v. First Nat'l Bank*, 97 Nev. 474, 475, 635 P.2d 276 n.1 (1981).[10] There is no reason to think that it did

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[10] *See also Barnes v. Delta Lines*, 99 Nev. 688, 669 P.2d 709 (1983); *Ross v. Giacomo*, 97 Nev. 550, 556, 635 P.2d 298, 302 (1981); *Eikelberger v. Tolotti*, 96 Nev. 525, 611 P.2d 1086 (1980); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980); *Alpark Distrib., Inc. v. Poole*, 95 Nev. 605, 608, 600 P.2d 229, 231 (1979); *Powers v. Johnson*, 92 Nev. 609, 555 P.2d 1235 (1976); *Bill Stremmel Motors, Inc. v. Kerns*, 91 Nev. 110, 531 P.2d 1357 (1975); *Bradshaw v. General Elec. Co.*, 91 Nev. 124, 531 P.2d 1358 (1975); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970); *Wadsworth v. Dille*, 85 Nev. 86, 450 P.2d 362 (1969); *Fireman's Fund Ins. Co. v. Shawcross*, 84 Nev. 446, 442 P.2d 907 (1968); *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855 (1964); *Duran v. Mueller*, 79 Nev. 453, 386 P.2d 733 (1963); *Wagon Wheel Saloon & Gambling Hall, Inc. v.*

otherwise in this case.[11] At best, the Nevada Supreme Court disposed of petitioner's constitutional claims in its general remark that: "Other contentions . . . are deemed to be totally without merit." Pet. App. 69a. Because the state supreme court had been made aware of the fact that this Court had considered, but not yet resolved, these constitutional issues, this hold-

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Mavrogan, 78 Nev. 126, 369 P.2d 688 (1962); *Lathrop v. Smith*, 71 Nev. 274, 288 P.2d 212 (1955).

[11] Petitioner asserts that the Nevada Supreme Court has "[a] practice of routinely considering constitutional questions raised for the first time on appeal." Pet. Br. at 9 n.4. The argument is both misleading and overstated. In the first place, petitioner cites no case where the Nevada Supreme Court has agreed to hear a constitutional challenge to jury instructions that was not raised in a timely fashion in the trial court. In one of the cases petitioner cites, *Batesel v. Schultz*, 91 Nev. 553, 540 P.2d 100 (1975), the dissenting judge took the position that, even though an objection to the instructions had been made, it was not sufficiently precise to preserve the issue for appeal. The remaining cases relied on by petitioner involved objections that did not challenge the validity of the jury instructions. *See, e.g., Natchez v. Board of Optometry*, 102 Nev. 247, 251, 721 P.2d 361, 363 (1986) (due process challenge to composition of state administrative agency); *Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643, 600 P.2d 1189, 1190-91 (1979), *cert. denied*, 445 U.S. 964 (1980) (separation of powers challenge to automobile dealership statute). Even in cases not involving jury instructions, moreover, the Nevada Supreme Court only considers it "occasionally appropriate" to take cognizance of a constitutional issue not raised in the trial court. *Desert Chrysler-Plymouth, supra*, 95 Nev. at 643, 600 P.2d at 1191. *See also Wilkins v. State*, 96 Nev. 367, 609 P.2d 309 (1980) (constitutional questions will not be reviewed in the absence of a sufficiently developed record which demonstrates that fundamental rights are implicated and which provides an adequate basis for review) (failure to raise timely objection to admission of evidence held to be waiver of Fifth and Sixth Amendment claims).

ing could only have represented a judgment based on state procedural grounds.

Even on appeal, moreover, petitioner's claim that "the jury received no proper guidance on the question of damages" was briefed only in a "superficial and cursory manner" and never raised at oral argument. Pet. App. 14a n.9.[12] Rather, petitioner's basic argument on appeal was the same as that at trial: the evidence was insufficient to support any award of punitive damages at all. There is thus no basis in the record for suggesting that the Nevada Supreme Court "passed upon" petitioner's due process claim.

Nor can petitioner argue that its belated constitutional challenge to the jury instruction is simply an alternative, legal defense of the judgment below.[13] The

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[12] Petitioner relies on the fact that the Court went on to state that "the major focus of Combined's argument in its briefs on appeal was that the verdict constituted an excessive fine or a violation of due process under the constitution." Pet. App. 14a n.9. On its face, this is simply a misstatement. Petitioner's constitutional claims amounted to little more than a two-page afterthought in a sixty-page brief. This statement cannot be squared with the Court's prior characterization of petitioner's challenge to the jury instructions as "superficial and cursory." *Ibid.* Possibly, the court meant to include in its characterization of the "excessive fine" issue all of the challenges—constitutional and non-constitutional—to the punitive damage award.

[13] By its terms, Rule 51 provides that: "*no party* may assign as error the giving or the failure to give an instruction unless he objects thereto." (Emphasis supplied). While petitioner properly recognizes "[t]he Nevada Supreme Court follows the rule, also adhered to by this Court, that it will affirm a legally correct judgment on any legitimate ground," Pet. Br. at 7 n.1, petitioner fails to realize that when a basis for affirming a judgment is raised for the first time on appeal, it will be considered "only

judgment below had been that the evidence did not support a punitive damage award at all, and that, therefore, the issue should never have gone to the jury. The constitutional issue, however, arises only if the issue should go to the jury; it raises a question about the content of the instructions to be given to the jury. To see that this is not a legal argument in support of the judgment below one need only consider the relief to which petitioner would have been entitled had the Nevada Supreme Court reached the merits of the constitutional claim and ruled affirmatively in petitioner's favor. The relief petitioner would have obtained could not have been an affirmance of the judgment below. Rather, petitioner, at best, could have hoped for a new trial on the amount of punitive damages. The law of the case would have remained that petitioner's behavior satisfied the state law standards for an award of punitive damages—precisely the issue upon which petitioner had won at the trial level.

In sum, petitioner has failed to meet the heavy burden of establishing jurisdiction in this Court by affirmatively demonstrating that the Nevada Supreme Court actually passed upon its due process claim. Indeed, this Court has previously held that jurisdiction was not present in identical circumstances. Thus, in *Exxon Corp. v. Eagerton, supra*, the Alabama Supreme Court declined to "discuss" a federal claim that had never been raised in the trial court. 462 U.S. at 181 n.3. This Court held that, even though the federal issue was raised and briefed on appeal,

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in exceptional cases." *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (quoting *McGoldrich v. Compagnie Gen. Transatlantique*, 309 U.S. 430, 434 (1940)).

the record provided no basis for jurisdiction "for it does not affirmatively appear that that issue was decided below." *Ibid.* (citing *Bailey v. Anderson*, 326 U.S. at 206-07). On the contrary, the Court explained, "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Ibid.* For precisely the same reasons, the same conclusion follows in this case.

II. The Record Below Is Inadequate To Allow For Proper Consideration Of A Major Constitutional Challenge To A Fundamental Doctrine Of State Tort Law.

Even if the Court had jurisdiction to review this case, there are sound reasons to decline to do so. In fact, in each of the past three terms the Court has refused to decide due process challenges to punitive damages awards even though the issue was fully briefed and argued by the parties. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Bankers Life & Casualty Co. v. Crenshaw, supra*; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). As the Court explained in *Bankers Life*, "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion." 108 S. Ct. at 1651 (quoting *Illinois v. Gates*, 462 U.S. 213, 224 (1983)). In particular, "a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal," cautions against deciding such an issue prematurely. *Ibid.* By not rushing to judgment, in short, the Court can ensure that the "[State] Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate

review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits." *Ibid.* *See also Browning-Ferris Indus., Inc.*, 109 S. Ct. at 2921 n.23 (challenge to punitive damages would not be heard "in the absence of a record on the due process point developed in the District Court and the Court of Appeals").

The instant case presents the Court with nothing more than an opportunity to reprise these recent rulings. There is not a word in the opinions of either the trial court or the Nevada Supreme Court addressing petitioner's concerns about jury discretion in punitive damages cases. This is a glaring omission in a case that seeks to eliminate, on federal constitutional grounds, jury instructions that have been in use for decades. A thoughtful analysis of the entire process of determining and reviewing punitive damages awards under the challenged system is indispensable to a resolution of that challenge. This information is simply not available in the record, because petitioner did not object until after it had lost under jury instructions that it had previously accepted. In this circumstance, there is no justification for departing from the Court's settled practice of declining to resolve a constitutional claim on an inadequate record.

III. There Have Been Important Changes In Nevada Law That Were Largely Adopted After The Decision In This Case.

In addition to the problems created by an inadequate record, the Court in *Bankers Life* also declined to resolve the constitutional issues on grounds of comity. Specifically, it noted its clear preference for state

court and legislative solutions rather than a constitutional ruling in the area of punitive damages, which is such an important and longstanding part of state tort law. 108 S. Ct. at 1651 & n.3. In Nevada, this Court's invitation has been accepted by both the legislature and the supreme court. In the past two years, these bodies have adopted significant reforms concerning the process by which such damages are awarded by the jury, the standards by which they are to be reviewed by the courts, and their maximum size.[14] For this reason alone, the instant case is particularly ill-suited for review by this Court.

The first major changes in state law occurred in late 1987, when the Nevada Supreme Court decided *Ace Truck, supra.* In that case, the court abandoned its prior policy of according highly-deferential review to punitive damages awards. *See, e.g., Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824 (1962). Expressing its disapproval of the notion that a "trial judge or jury should have unbridled discretion in setting the amount of punitive damages," the court de-

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[14] Many other states also have amended or reformed the procedural or substantive law of punitive damages since 1986. *See, e.g.*, Ala. Code § 6-11-21 (Supp. 1988); Alaska Stat. § 09.17.020 (1986); Ariz. Rev. Stat. Ann. § 12-701 (1989); Colo. Rev. Stat. § 13-21-102 (1987); Conn. Gen. Stat. Ann. § 52-240b (West 1988); Fla. Stat. Ann. § 768.73 (West Supp. 1988); Ga. Code Ann. § 51-12-5.1 (Supp. 1988); Idaho Code § 6-1604 (1980); Kan. Stat. Ann. § 60-3701 (Supp. 1987); Minn. Stat. § 549.24 (1986); Mo. Ann. Stat. § 510.263 (Supp. 1989); Mont. Code Ann. § 27-1-221 (1987); N.D. Cent. Code § 32-03.2-11 (1987); N.J. Rev. Stat. § 2A:58C-5 (1987); Ohio Rev. Code § 2315.21 (1988); Okla. Stat. Ann. tit 23, § 9 (1986); 1987 Or. Laws 774; S.C. Code § 15-33-135 (1988); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon 1987); Utah Code Ann. § 78-18-1 (1989); Va. Code Ann. § 8.01-38.1 (Supp. 1988).

cided "to develop standards to determine the reasonableness of punitive damages in a given case and thereby limit the upper amount that can be properly and justly awarded as punitive damages." *Ace Truck, supra*, 746 P.2d at 134-35. In particular, it set out the following criteria by which courts should review such awards: (1) the financial wealth of the defendant; (2) the culpability and blameworthiness of the defendant; (3) the vulnerability of, and injury suffered by, the offended party; (4) the offensiveness of the conduct compared to societal values of justice and propriety; and (5) the means necessary to control the offensive conduct. *Id.* at 137. *See also United Fire Ins. Co. and United Diversified Corp. v. McClelland*, No. 18705, 105 Nev. Adv. Op. 100 (Sept. 6, 1989) (*Ace Truck* standards applied).

Cognizant of the decision in *Ace Truck*, as well as the decision in the instant case, the Nevada legislature recently adopted additional reforms in this area. Effective May 30, 1989, Nev. Rev. Stat. Ann. § 42.010(2) imposes new procedural protections in all cases involving punitive damages, including the requirement that the predicate conduct of oppression, fraud or malice be proved by "clear and convincing evidence." Pet. App. 201a.[15] In addition, the statute requires bifurcation of the trial so that the amount of punitive damages will be assessed in a separate proceeding, at which the jury will receive evidence, for the first time, as to the financial condition of the

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[15] Although petitioner failed to request at trial that Mr. Ainsworth be held to this standard, it argued strongly for precisely this burden of proof in its appellate briefs to the Nevada Supreme Court. In fact, this contention was given priority over its Eighth Amendment and due process claims. Pet. App. 91a.

defendant. *Ibid.* Finally, it sets a "cap" on punitive awards (three times compensatory damages or $300,000, whichever is higher), and provides that the jury may not be advised of this cap in reaching its verdict. *Id.* at 202a.[16]

These recent changes in Nevada law ensure that its procedures for administering punitive damages will withstand constitutional scrutiny under the due process clause. *See, e.g., Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852). More significantly for present purposes, however, these changes make the instant case a poor candidate for review by this Court in two significant respects. First, the system of punitive damages that petitioner asks the Court to review is no longer in effect in Nevada. The legislative changes were adopted subsequent to the decision below and, while the standards in *Ace Truck* were applied in affirming the jury's verdict in this case, those standards may not have been put to their true test because petitioner "did not address in a meaningful way the specific factors set forth in *Ace Truck*" Pet. App. 14a n.9. Indeed, the Nevada Supreme Court frankly stated that it "may have been much more receptive to Combined's contentions, [regarding excessiveness] if they had been cogently presented on appeal rather than belatedly asserted in a petition for rehearing." *Ibid.*

[16] The statute exempts certain categories of claims, such as bad faith denials of insurance claims, from this cap. Having done so with particular knowledge of the instant case, the legislature has expressed its considered view that such behavior requires a greater measure of deterrence in Nevada than do other torts. That view, based on an intimate knowledge of local conditions, should not be lightly set aside on constitutional grounds, as petitioner would suggest.

These recent changes make this case unworthy of review for another reason as well. Having devoted significant time and energy to responding to the Court's invitation in *Bankers Life*, the Nevada Supreme Court and legislature should not have their efforts placed in immediate jeopardy by a premature constitutional ruling that will inject a federal issue into every case involving punitive damages. Instead, these reforms should be allowed to develop so that the state legislature and judiciary can assess their effects and determine whether other changes are needed. These institutions, as the Court has previously indicated, are likely to provide "less intrusive, and possibly more appropriate, resolutions" to the issues presented by the petition. *Bankers Life*, 108 S. Ct. at 1651.

IV. Combined Should Not Be Heard To Complain Of Its Own Decision Not To Raise A Due Process Issue At Trial.

Petitioner, through its admitted bad faith and oppressive withholding of accrued benefits, did not merely cause serious distress to Mr. Ainsworth and his wife. As the record shows, petitioner's conduct aggravated the very physical maladies that its insurance policy bound it to alleviate through payment of the promised benefits. Pet. App. 68a.

Petitioner forced the disabled and financially distressed respondent to seek justice through legal action. Petitioner was represented at trial by experienced Nevada counsel. Counsel was given every opportunity to present petitioner's case to the jury, tendering for the jury's consideration whatever issues might seem strategically useful. Evidently, petitioner's counsel did not desire jury instructions that formu-

lated "standards" by which to assess the amount of any award of punitive damages. The only objection petitioner tendered was to the giving of any instruction on punitive damages at all. No objection was made to the form of the instruction. No attempt was made to tender any other instruction. Nor was any suggestion made to the trial judge by petitioner's counsel that an explicit statement of "standards" would even be of value—much less that "standards" were essential to due process of law.

Nothing prevented petitioner's counsel from presenting this position to the trial court, had counsel believed that an explicit statement of standards was important. Counsel was aware of Rule 51 and the need to raise contemporaneously any objection to jury instructions. The failure to pose such an objection represented a reasonable tactical decision by petitioner. The facts reflected in the record point toward the conclusion that any "standards" which may have been formulated in this case (had petitioner requested them) would have as likely worked against petitioner's position, as for it.

The Nevada Supreme Court's review of the record in this case, in light of the standards articulated in *Ace Truck*, demonstrates this. The facts of the instant case weighed positively for Mr. Ainsworth, and against petitioner; they supported an assessment of substantial punitive damages.[17] In short, counsel got

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[17] Precisely the same reasons supported Combined's tactical decision not to "address in a meaningful way the specific factors set forth in *Ace Truck*," on appeal. Pet. App. 14a n.9.

the kind of trial they wanted.[18] For reasons of their own, petitioner's counsel chose to hold the constitutional claim in reserve, until after an unfavorable verdict. The opinions of the Nevada Supreme Court show that on appeal petitioner continued to engage in an abusive strategy of delay and obstruction. The court not only affirmed the jury's finding that petitioner had acted in bad faith, as well as "oppressively" in its dealings with Mr. Ainsworth; it also condemned, in the strongest possible terms, numerous procedural ploys pursued by petitioner. The Court described them as "reckless[]," Pet. App. 20a n.12; "frivolous," *Id.* at 21a; a "nullity," *Id.* at 17a; made "irresponsibly" *Id.* at 26a n.15; incapable of being " 'seriously [] contended,' " *Id.* at 31a; "speculative," *Id.* at 40a; "wholly insufficient," and "specious" *Id.* at 41a & n.22; and suggestive of a "misuse [of] the appellate processes of this court for the sole purpose of delaying a final resolution of this litigation." *Id.* at 43a. By these tactics petitioner has delayed accountability on the jury's verdict for an additional three and one-half years.

In conclusion, it is submitted that petitioner should not be allowed to continue this pattern by asking this Court to grant a new trial on conditions different from those which petitioner sought during its day in court. Mr. Ainsworth is not only elderly, but seriously ill, in part directly due to petitioner's oppressive con-

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[18] Combined's counsel may also have hoped that the jury would split the total award between compensatory and punitive damages. Counsel may have sought to keep in reserve a new constitutional challenge to the latter. The result of this tactic would have been not only to defeat the punitive damages, but to suppress the compensatory damages as well.

duct. If this oppressive litigation is allowed to continue on issues never raised at trial, there is good reason to suggest that much or all of what is left of Mr. Ainsworth's life will be consumed during the process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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